Supreme Court, U.S.
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No. 92-216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON,
Petitioners,

v.

UNITED DOMINION INDUSTRIES, INC., PST, INC., and PRESSED STEEL TANK CO., INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF

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Pursuant to Supreme Court Rule 15.7, petitioners file this supplemental brief to their petition for certiorari to apprise the Court of a recent development in the Seventh Circuit and to request that the Court either hold the petition in abeyance or grant the petition and vacate and remand the above-captioned case to the Seventh Circuit for reconsideration.

1. Petitioners timely filed their petition for certiorari in the above-captioned case ("*Senn*") on August 3, 1992. Later that same day, petitioners learned that in a case denominated *Bidlack v. Wheelabrator*, No. 91-2378, the Seventh Circuit had issued an order setting for hearing before the Court *en banc* the question whether *Senn* should be overruled. Specifically, the order states:

1. Whether *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992), should be overruled. In particular, should this Circuit retain a default rule that health and welfare benefits established in collective bargaining agreements do not vest on an employee's retirement?

2. If this court retains *Senn*, under what circumstances, if any, may extrinsic evidence be used to demonstrate the parties' intent to create vested benefits? In particular, (a) should the *Senn* default rule be applied before or after resort to extrinsic evidence of the parties' intent, and (b) if the *Senn* default rule is applied before resort to extrinsic evidence, should it preclude such evidence in cases of extrinsic ambiguity?

2. If the Seventh Circuit overrules its decision in *Senn*, that decision would no longer be a suitable vehicle for this Court to use in resolving the three-way conflict among the circuit courts of appeals created by *Senn*. However, if the Seventh Circuit retains its decision in *Senn*, the petition for certiorari in *Senn* would continue to present the three-way conflict among the circuits described in the petition and should be granted for the reasons stated therein.

3. Petitioners therefore respectfully request that the Court either hold their petition for certiorari in abeyance pending the Seventh Circuit's *en banc* consideration of whether the decision in *Senn* should be overruled, or grant the petition and vacate and remand the case to the Seventh Circuit for reconsideration in light of that Court's pending *en banc* decision in *Bidlack v. Wheelabrator. E.g., Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991).

4. If this Court elects to hold the petition, and if the Seventh Circuit subsequently overrules *Senn*, petitioners ask that this Court simply grant the petition and vacate *Senn* and remand it to the Seventh Circuit for reconsideration. If, however, the Seventh Circuit retains its de-

cision in *Senn*, petitioners ask that this Court grant certiorari for the reasons set forth in the petition filed August 3, 1992.[1]

Respectfully submitted,

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[1] As a consequence of the Seventh Circuit's order, petitioners also filed in the Seventh Circuit a motion requesting the Court to recall its mandate in *Senn* and to either reconsider its decision in *Senn* simultaneously with its *en banc* consideration of *Bidlack v. Wheelabrator*, or hold *Senn* for reconsideration in light of the *en banc* Court's resolution of the questions set forth in its order setting *Bidlack* for *en banc* consideration. The pendency of the petition for certiorari does not deprive the Seventh Circuit of jurisdiction to recall the mandate, *see Oneida of the Thames Band v. N.Y.*, 771 F.2d 51 (2d Cir. 1985); *Kinnear Weed Corp. v. Humble Oil & Refining Co.*, 296 F.2d 215 (5th Cir. 1961). Of course, if the Court were to grant certiorari, that would immediately deprive the Court of Appeals of jurisdiction.